INDEX

	Page
Opinion below	1
Jurisdiction	1
Statute involved	2
Questions presented	2
Statement	3
Diebold's motion for summary judgment	6
The Government's showing in opposition	8
A. HHM's long-term financial picture	9
B. HHM's financial picture during its last full fiscal year prior to the closing	11
C. Comparison of HHM's financial strength and operating performance with those of Diebold and Mosler Safe Company	14
D. HHM's increasing share of the market	16
E. HHM's credit standing	16
F. The price paid	16
G. The statements and conduct of the parties as they bear on the theory that the sale was made to avoid financial disaster	17
H. Other prospective purchasers	18
Introduction and summary of argument	21
Argument	25
I. The undisputed facts show that the acquisition does not come within the "failing company" doctrine of the *International Shoe* case	25
A. HHM was not in a failing or bankrupt condition at the time of the acquisition	26
B. Diebold was not the only available purchaser of HHM; at least three other prospective purchasers were interested	31
C. HHM would not have been required to liquidate its business in insolvency proceedings if it had not been sold to Diebold	35

632433—62——1

Argument—Continued
II. The findings upon which the District Court upheld the failing company defense rest upon material facts and inferences which are the subject of dispute, summary judgment was therefore improper ..... Page 38
Conclusion 44

CITATIONS

Cases:
Beegle v. *Thomson*, 138 F. 2d 875 23
Crown Zellerback Corp. v. *Federal Trade Commission*, 296 F. 2d 800 ..... 23, 30, 31
Erie Sand & Gravel Co. v. *Federal Trade Commission*, 291 F. 2d 279 ..... 23, 34
Farm Journal, Inc., 53 F.T.C. 26 23
In re Pressed Steel Car Co. of New Jersey, 16 F. Supp. 329 23
International Shoe Company v. *Federal Trade Commission*, 280 U.S. 291 .. 3, 6, 21, 22, 24, 25, 26, 27, 31, 35, 42
Pillsbury Mills, Inc., CCH Trade Reg. Rep. (1960–1961 FTC Cas.) 23, 31
Poller v. *Columbia Broadcasting System, Inc.*, No. 45, this Term, decided Feb. 19, 1962 ..... 38, 40, 44
United States v. *Maryland & Virginia Milk Producers Ass'n*, 167 F. Supp. 799 23

Statutes:
Clayton Act, 38 Stat. 730, as amended, 15 U.S.C. 1 *et seq.*:
Section 7 ..... 1, 2, 3, 4, 21, 22, 23, 24
Section 15 1
Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29:
Section 2 2
Federal Rules of Civil Procedure:
Rule 56 38

Miscellaneous:

	Page
Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226*	22, 31, 32
6 Moore's Federal Practice (2d ed.)	2
Note, 68 Yale L. J. 1627	22, 32
96 Cong. Rec. 16601	23
H. Rep. No. 1191, 81st Cong., 1st Sess	23
S. Rep. No. 1775, 81st Cong., 2d Sess	23

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 286

UNITED STATES OF AMERICA, APPELLANT

v.

DIEBOLD, INCORPORATED

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court rendered no opinion in granting appellee's motion for summary judgment.

JURISDICTION

The United States brought this action against Diebold, Incorporated and Herring-Hall-Marvin Safe Company under Section 15 of the Clayton Act, 15 U.S.C. 25, alleging a violation of Section 7 of that Act. On March 8, 1961, the district court entered a judgment (R. 561) granting Diebold's motion for summary judgment, and on June 23, 1961 the court, on motion of the United States, entered an order dismissing the complaint against Herring-Hall-Marvin

Safe Company (R. 594). Notice of appeal was filed on July 3, 1961 (R. 595), and this Court noted probable jurisdiction on November 6, 1961 (R. 597; 368 U.S. 894).[1] The jurisdiction of this Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C 29.

STATUTE INVOLVED

The first paragraph of Section 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. 18, provides as follows:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

QUESTIONS PRESENTED

In a suit challenging a corporate asset acquisition under Section 7 of the Clayton Act, the district court granted defendant-appellee's motion for summary

---

[1] The government had filed a notice of appeal from the earlier judgment on May 5, 1961. The second notice of appeal was filed to guard against the claim that the earlier notice of appeal was premature, since as of that date the action was still pending against Herring-Hall-Marvin. See 6 Moore's Federal Practice (2d ed.), par. 54.34[2].

judgment. The court held that the acquired firm was a "failing company" under the standard enunciated in *International Shoe Company* v. *Federal Trade Commission,* 280 U.S. 291, and that its acquisition accordingly did not threaten or cause a lessening of competition. The following questions are presented:

1. Whether the district court erred in accepting the "failing company" defense where the uncontradicted evidence established that (a) the acquired company had consistently operated at a profit, paid dividends, enjoyed an increasing share of the market, and steadily improved its basic financial condition, and (b) there were other potential purchasers, not in competition with the acquired company, which had expressed an active interest in acquiring it, and where there was no showing that sale of the company was the only real alternative to its going out of business.

2. Whether, in any event, the district court improperly granted appellee's motion for summary judgment.

STATEMENT

This is a civil antitrust suit by the United States challenging a corporate asset acquisition as violating Section 7 of the Clayton Act. The district court, without ever considering the effect of the acquisition on competition, dismissed the case on the ground that the acquired firm was a "failing company" under the doctrine of *International Shoe Company* v. *Federal Trade Commission,* 280 U.S. 291, and that the acquisition of its assets by a competitor was therefore beyond the reach of the statute.

On August 24, 1959, the United States filed a complaint (R. 1–4) against appellee Diebold, Incorporated ("Diebold") and Herring-Hall-Marvin Safe Company ("HHM"). It alleged that Diebold and HHM manufacture bank vault and related products, and are two of the only three firms in the United States which manufacture and sell bank vaults and bank vault doors; that on July 17, 1959 the two companies had entered into an agreement for the sale of HHM's assets to Diebold; and that the effect of carrying out the agreement may be substantially to lessen competition or tend to create a monopoly in the manufacture and sale of such products, in violation of Section 7 of the Clayton Act.

The government simultaneously filed a motion for a preliminary injunction to prevent consummation of the acquisition pending determination of the merits of the complaint (R. 5). In opposition, Diebold filed the affidavit of Raymond Koontz, its president (R. 6–25). Koontz did not assert that the financial condition of HHM was poor. His principal contention was that Diebold had made a favorable purchase and would lose its benefits if the injunction were granted. He also contended that both the suit and the request for an injunction were instigated by the president of HHM, in order to avoid HHM's obligations under the contract of sale (R. 6–14, pars. 1–30).[2]

---

[2] The contract provided that it would automatically terminate if its performance should be prevented by an injunction for longer than 120 days from July 17, 1959, unless extended by the parties for an additional 120 days (R. 14, par. 29).

The district judge denied the government's motion for a preliminary injunction (R. 144) and on September 11, 1959, the sale was consummated (R. 190). On September 16, 1959, Diebold filed its answer which denied the allegations of the complaint but made no reference to the financial condition of HHM (R. 158).

The first time that Diebold alluded to HHM's financial difficulties was many months later. On November 18, 1960, the government filed a motion for an order to require Diebold to give 60 days' notice of any contemplated disposition of the principal assets it had acquired from HHM (R. 170–171). The motion stated that it was filed because Diebold had informed the government that it contemplated closing the existing HHM sales offices. During the hearing on the motion (held on the same day), Diebold's counsel stated that after the sale Diebold discovered that HHM was losing money, and that "within one month we were left with a company that was in the gravest financial straits" (R. 191); and that, because of that condition and the loss of a number of key HHM salesmen to the Mosler Safe Company, Diebold had decided to relocate the remaining HHM salesmen in the Diebold offices. The district court observed that HHM was a "defunct organization" and "practically bankrupt when it was merged" (R. 199, 204). The court also stated (R. 200) that "this suit has been pending too long now," that "the government should have come in and agreed to a consent entry of some kind to terminate it" (*ibid.*, see R. 203, 205, 206); and that "when the Administrative

Office [of the United States Courts] is on our back wanting to know why this case is pending so long * * * it seems to me that there is a lot of affairs going on in the United States regarding mergers that are a lot more important than this is" (R. 202).[3]

DIEBOLD'S MOTION FOR SUMMARY JUDGMENT

On January 19, 1961, Diebold moved for summary judgment (R. 222). Citing *International Shoe Company* v. *Federal Trade Commission,* 280 U.S. 291, it argued that Section 7 was inapplicable to a "failing company," and that the undisputed facts showed "HHM was obviously a firm *in extremis*" on the settlement date (September 11, 1959) and "could not possibly have long survived" (Unprinted Diebold Memorandum in Support of Motion for Summary Judgment, p. 15). In support of this position, Diebold filed affidavits of its president (R. 262–265), its vice-president (R. 552–560) and the president of HHM (R. 265–268); special audit reports of a certified public accountant (R. 227–257); and a report of a firm of consulting engineers (R. 259–262).

As set forth in its memorandum in support of the motion and its proposed findings of fact, Diebold sought to establish the following:

1. From June 1950 to September 1959, HHM had been short of working capital (current assets minus

[3] The district court apparently regarded the government's motion for 60 days' notice as another "request for a temporary injunction" (R. 205) and did not act on it.

current liabilities) and for the years 1951 through 1959 its working capital ratio (relationship between current assets and current liabilities) averaged only 1.5 in contrast with an average of 2.7 for all manufacturers of fabricated metal products.

2. From June 1950 through 1958, HHM's liabilities exceeded its tangible net worth.

3. HHM's net sales were $10,672,000 in 1956–1957, but decreased by approximately $300,000 in each of the two following years (fiscal 1958 and fiscal 1959); inventories increased in fiscal 1959 by $262,000.

4. The company was short of cash and frequently overdrawn on its bank accounts between April 1959 and September 1959. During the summer of 1959 it did not have sufficient cash to pay its bills as they became due.

5. Between July 1, 1959 and September 17, 1959 (the day before settlement), HHM sustained operating losses exceeding $206,000.

6. In September, 1959, soon after the closing, Diebold advanced $500,000 in cash to meet past and currently due trade obligations of HHM.

7. In the spring of 1959, the HHM union presented HHM with "excessive demands" to which HHM had to yield. Because of this, the president of HHM "gave serious consideration" to recommending to the Board of Directors that HHM be liquidated (R. 267).

8. In the opinion of certain consulting engineers, HHM was a high-cost producer which could exist only as a marginal operation and which could probably not survive in a highly competitive market.

9. Following the acquisition, orders placed with the HHM Division of Diebold declined. This resulted in employee lay-offs; 294 of the 664 HHM employees were dropped from the payroll within less than a year and a half after the acquisition.

THE GOVERNMENT'S SHOWING IN OPPOSITION

In opposition to the motion for summary judgment, the government presented substantial factual information [4] to show that HHM was not facing imminent financial collapse; that its basic economic condition was sound; that the long-term financial picture of the company was that of almost uninterrupted improvement; that its financial situation during its last full fiscal year of operation prior to the closing showed a vigorous and flourishing enterprise; that the company's financial condition and operating performance were good compared to the other major firms in the industry; and that, in light of the company's increasing share of the market, future prospects were favorable. The government also presented material showing that HHM enjoyed a favorable credit standing; that Diebold had paid a premium price for HHM's

[4] The government's opposition was based chiefly on the affidavits of a government accountant and a government economist and supporting documents which included the published financial statements of HHM, the respective federal income tax returns, for the five years preceding the merger, of HHM, Diebold and the Mosler Safe Company (a competitor in the bank vault equipment market), the special audit reports filed by Diebold in support of the motion, credit reports on HHM, and census reports of HHM and for the bank vault equipment industry in general.

assets; that the conduct of the parties long before the "failing company" defense was first asserted was inconsistent with the claim that HHM was on the brink of financial disaster; and that, although Diebold may have been the only purchaser willing to agree to the terms and price at which the sale was made, there were other prospective purchasers interested in acquiring HHM at a reasonable price. We summarize below the material presented by the government in support of these contentions.

A. *HHM's long-term financial picture.* Data based on HHM's published financial statements and on the special audit reports filed in support of Diebold's motion show the following:

1. During the fifteen years preceeding the acquisition in 1959, HHM's net sales rose from $1,157,967 in 1944 to $5,023,270 in 1949, to $6,898,633 in 1954 and to $10,672,279 in 1957. Although sales dropped approximately $300,000 in fiscal 1958 and another $300,000 in fiscal 1959, net sales in each of these years still exceeded $10,000,000 (R. 337).

2. The company's working capital progressively improved from a minus position of $167,305 in 1944 to a favorable balance of $217,538 in 1949, $547,143 in 1954 and $1,317,755, the highest in its history, in 1959 (R. 340). Although its working capital ratio averaged about 1.5 for the years 1951 through 1959, the ratio showed almost uninterrupted improvement from 1944 to 1959; and the ratio of 1.68 in 1959 was its best

except for 1951 and 1952 when 1.70 was achieved (*ibid.*).[5]

3. Its retained earnings account increased from a deficit position of $385,144 in 1944 to a favorable position of $787,617 in 1950, to $1,254,616 in 1954, and to $2,247,987 in 1959 (R. 339).

4. During fiscal 1959 HHM reduced its liability on notes and loans payable from more than $700,000 to less than $300,000; it had no long-term debt as of June 30, 1959; and the mortgage on its land, building and equipment which amounted to almost $325,000 as of June 30, 1955, was paid off by June 30, 1958 (R. 331, par. A6; R. 600, 605).

5. In the fiscal years 1955 through 1959, HHM's net income after taxes ranged from $116,924.41 (1955) to $256,415.61 (1956); in 1957, 1958 and 1959, it was repectively $181,710.81, $185,776.52 and $187,602.73 (R. 331, par. A1; R. 334, Table 1). The average annual return on investment for this period was in excess of 11 percent after taxes. For the fiscal year 1959, it

---

[5] One of the special audit reports filed in support of Diebold's motion for summary judgment was a comparison of HHM's "current" or "working capital" ratio and also its "quick ratio" with those of the metal fabricating industry (R. 253–256; (See Fdg. 6, R. 563)). The government's economist challenged the validity of (a) comparing such ratios between a manufacturer of bank vault equipment and a group composed of a great many heterogeneous types of companies (none well known in the bank vault equipment field) and (b) using such ratios rather than a large number of more meaningful relationships, as an indicator of a company's solvency (R. 601–604, pars. 7–8). The report's "quick ratio" figures (R. 256; Fdg. 6, R. 563) were also challenged because they were made without regard to the company's receivables (R. 333, par. B6).

was 19.6 percent before taxes and 8.98 percent after taxes (*ibid.*).

6. The company paid dividends of $2.00 a share (on its approximately 5,900 outstanding shares) for each of the five fiscal years 1955 through 1959 (R. 331, par. A3; R. 334, Table 3).

7. Although HHM's liabilities exceeded its tangible net worth from 1950 through 1958, the gap between the two consistently narrowed until in 1958 tangible net worth was about equal to total liabilities (non-current as well as current). In 1959, tangible net worth was $2,313,441 compared with total liabilities of $1,930,742 (R. 243).

8. During the period from 1950 to 1959, while the company's annual average sales volume approximately doubled, the ratio of the company's cost of sales and selling and administrative expenses to net sales remained about the same (R. 332, par. B1; R. 337). During this same period, the company's inventory turnover improved considerably, averaging an approximate turnover of once every 69 days as contrasted with a turnover of once every 98 days in the earlier period from 1944 to 1950 (R. 332, par. B5; R. 342).

B. *HHM's financial picture during its last full fiscal year prior to the closing.* HHM's last full fiscal year of operations prior to the closing date of the sale ended on June 30, 1959. Data for this year, based on HHM's published financial statement and on the special audit reports filed in support of Diebold's motion, show the following:

HHM's net sales, although declining about 3 percent, were the third highest in its history (R. 337). Its working capital was the highest in its history (R. 334, Table 5; R. 340). The company's income of $409,403 before taxes and $187,602 after taxes represented a return on investment before and after taxes, respectively, of 19.6 percent and 8.98 percent (R. 334, Table 1; R. 337). The company paid its usual $2 dividend per share (R. 334, Table 3). Its retained earnings account was the highest in its history (R. 334, Table 2; R. 339). HHM reduced its liability on notes and loans payable by more than half, from more than $700,000 to less than $300,000, and had no long-term debt (R. 331, par. A6; R. 335). Its tangible net worth exceeded its total liabilities by more than $380,000 (R. 334) and, according to the company's certified financial statement, its inventory increased only about $103,000 (R. 335, Table 6).[6]

Data based on an examination of the federal income tax returns of the three major companies in the field (HHM, Diebold and the Mosler Safe Company) showed that in 1959 HHM made relatively greater improvements in its financial condition and more effective use of its resources than did Mosler; and that in some respects HHM did better than Diebold and in others not as well (see *infra*, pp. 14–16).

---

[6] According to the special audit report prepared by Lybrand, Ross Bros. & Montgomery, the accounting firm which also certified HHM's financial statement (see unprinted Ex. 5 to Singman affidavit), HHM's inventory increased by $262,000 in fiscal 1959 (R. 239).

During the eight full months in 1959 preceding the closing, HHM's minimum bank balances at its principal depositary ranged from $6,143 to $142,586, and averaged over $60,000 a month (R. 437–438).[7] According to the government's economist, HHM's cash position was not critical, since a company, such as HHM, whose main customers were the federal government and the nation's banks, has less need to maintain large cash balances than a company which has a large number of small customers (R. 601, par. 6; R. 603).

The company's bank accounts were never overdrawn, but always had sufficient funds to cover any check actually presented for payment (R. 406–410).[8] According to the special audit report submitted by Diebold, HHM "followed the procedure of preparing checks in payment of invoices at the time invoices were approved, but of not releasing them until later." (R. 227–228). The government contended that these checks, even though not released to the payee until a later date (as well as those released but not yet presented for payment), were reflected on the company's own books as debits against its bank accounts as of the date drawn;

[7] The material submitted by the government relating to HHM's principal bank account was limited by the court, upon Diebold's motion, to the period in 1959 preceding the closing (R. 301–303, 311–312).

[8] Diebold has not contended that HHM's accounts with its banks other than its principal depositary (The First National Bank and Trust Co. of Hamilton) were ever overdrawn. The special audit report submitted by Diebold shows that these accounts were not overdrawn (R. 233).

and hence that the company's accounts may be said to have been "overdrawn" only if such checks are treated as though they had actually been presented for payment on the dates drawn and then only on certain dates, almost all of which were after an agreement for the sale of HHM's assets had been reached.[9]

C. *Comparison of HHM's financial strength and operating performance with those of Diebold and Mosler Safe Company.* Based on an examination of the federal income tax returns of HHM, Diebold and the Mosler Safe Company for the five-year period preceding the merger, the government economist (Albert C. Neisser) made a detailed comparison of the financial strength and operating performance of the three companies.[10] He concluded that an analysis of a large

---

[9] Except for a few days at the end of 1958 and in April, 1959, the "overdrafts" on HHM's total bank balances occurred between May and September 1959 (R. 553). An oral agreement for the sale of HHM's assets was reached by May 1959. In June, an option (to which was attached an agreement of purchase and sale) was signed. In July, the parties executed the agreement and the closing took place on September 11, 1959. (R. 7–10, 561–562).

[10] After granting the motion for summary judgment, the district court, on the motion of the Mosler Safe Company, ordered the sealing of Neisser's affidavit and the attachments thereto (R. 571–572, 592–593). The material was transmitted to this Court under seal. After this Court noted probable jurisdiction, Diebold filed a motion to unseal the material and to make it part of the open record on appeal. Mosler originally opposed the motion. It subsequently withdrew its objection to the printing of specified portions of the material, and also authorized any party to include in its brief "any material which may be reasonably necessary in the light of the arguments in the case * * *." (See letter to the Clerk, dated February 2, 1962, from White & Case, counsel for Mosler). Por-

number of relationships between various items shown on the balance sheets and income statements (such as the relationship between net income and net sales, net income and net worth, net sales and working capital, net sales and inventory, etc.), showed that HHM, as compared to the other two companies, had been in sound financial condition before the merger and that it had made effective use of its financial resources (R. 600, 604–605).

Specific examples of what the analysis showed are as follows: (1) From 1955 to 1959, HHM increased its return (net income) on net sales from 1.29 percent to 4.73 percent, while Diebold's return increased only from 6.64 percent to 10.81 percent and Mosler's declined from 7.99 to 2.07 percent (Neisser Affidavit, p. 8, par. 9); (2) HHM's return on tangible net worth (capital stock, paid in surplus, earned surplus and undivided profits) was 6½ percent in 1955 and more than 20 percent in each of the four succeeding years; Diebold returned about 25 percent in 1955 and about 35 percent for the next four years; Mosler's return on equity fell from 16.35 percent in 1955 to 4 percent in 1959 (*id.*, p. 8, par. 12); (3) although HHM had a narrow working capital basis, it was able to obtain more than twice as many sales per dollar of available working capital as either Mosler or Diebold for each of the five years preceding the acquisition (*id.*, p. 11, par. 20); (4) HHM's working capital had doubled between

---

tions of the affidavit and the supporting documents are printed at R. 599–638. Those portions which have not been printed will be referred to as "Neisser Affidavit."

1955 and 1959, rising from $649,000 to $1,354,000, while Diebold's increased only from $5,415,000 to $7,882,000 and Mosler's only from $6,169,000 to $7,098,000 (*id.*, p. 10, par. 17; Appendix: Table 7); and (5) although in fiscal 1959 HHM showed a profit of $36 for every hundred dollars of working capital and Diebold showed a profit of $41, Mosler's profit was less than $6 (*ibid.*).

D. *HHM's increasing share of the market.* A comparison of reports filed with the Census Bureau showed, with respect to key products, that from 1954 to 1958 (the years for which reports were available), HHM's rate of increase in sales was greater than that for all producers of such products, taken as a whole, and that HHM increased its share of the market (R. 600–601, par. 4; 607–613, 621–638).

E. *HHM's credit standing.* Dun and Bradstreet, Inc., in July and September, 1959, rated HHM "AA" for financial strength and gave it a composite credit appraisal of "A1" (R. 600, par. 4; R. 605, par. 29). HHM's principal bank depositary extended loans to HHM without requiring security or collateral and charged interest of only one-half to one percent above the prime rate (R. 459, 462).

F. *The price paid.* In exchange for the assets of HHM (which were carried on HHM's balance sheet at approximately $4,000,000), Diebold paid $3,000,000 in cash and assumed HHM's liabilities (R. 381–382) of approximately $1,800,000 (R. 389, 557). In addition, Diebold agreed to employ Mosman, HHM's president, for nine years, at $50,000 a year for the first

five years and $25,000 a year for the remaining four years (R. 96, 391–395).

G. *The statements and conduct of the parties as they bear on the theory that the sale was made to avoid financial disaster.*—Long before the "failing company" defense was asserted, officials of HHM and Diebold had filed affidavits describing the circumstances surrounding the sale. The government contended that the actions of those officials in negotiating the sale was inconsistent with the claim that HHM sold in order to avoid imminent financial collapse.

The first formal reference to HHM's financial difficulties was made in this case in November, 1960 (see *supra,* p. 5). On September 1, 1959, both Mosman, the president and controlling stockholder of HHM, and Koontz, the president of Diebold, filed affidavits in connection with the government's motion for a preliminary injunction. Mosman stated that for some time he had considered selling the business; that, from time to time, he had been approached by a number of prospective purchasers, including Diebold; and that he wanted to sell "because of the problems that might arise in the event of his death" (R. 26, par. 3).

Koontz contended that it was Mosman who, in order to avoid his commitment to sell HHM to Diebold, had induced the government to file this suit and to seek a preliminary injunction (see *supra,* p. 4). Koontz stated that Mosman had indicated that he wanted to sell to provide funds for his estate taxes and that Mosman was concerned because he had no top management personnel to carry on the business which he had dominated (R. 6, par. 3). Koontz further

related that, in May 1957, he and Mosman had reached an oral agreement for a sale on the following terms: $1,000,000 for net current assets, $750,000 for machinery and equipment, and a 20-year lease of the buildings at $100,000 a year. Mosman, however, refused to go through with the agreement, insisting on a higher price (R. 6–7, par. 4). In May, 1959, negotiations were reopened and an oral agreement was reached which later was reduced to a formal contract. Koontz stated that subsequently (during the period when HHM was allegedly in financial difficulties) Mosman repeatedly sought to get out of the contract and that Diebold resisted these efforts, going so far as to make revisions in the contract that were advantageous to HHM and to Mosman personally (R. 6–13, pars. 4–26).[11]

After negotiations were reopened in May 1959 but before Diebold committed itself to the purchase, Mosman informed Diebold that there were inaccuracies in the uncertified HHM balance sheet, on which the parties had relied in connection with the sale. He disclosed that he had reclassified $100,000 of "receivables" as "cash." Diebold nevertheless went ahead with the transaction (R. 222a, par. 2).

H. *Other prospective purchasers.*—There were at least three prospective purchasers, not in competition with HHM, who were interested in acquiring the business of HHM (R. 345–356, 357, 269–281, 283–

[11] The changes in Mosman's employment contract obligated Diebold to pay Mosman's expenses and also his dues at a number of "City" and "Country" clubs (R. 394).

288). Negotiations with one of these began in 1958 and continued until the prospective purchaser learned of the sale to Diebold. The negotiations had proceeded to the point where the prospective purchaser had inspected HHM's plant, submitted detailed financial figures (proposing a purchase price of $3,400,000), named Hayden Stone & Co., a large investment banking firm, to form a purchasing group, and made plans for a public offering of stock (R. 345–356, 270, 271–72). Mosman stated, however, that the offer was unsatisfactory to him since it proposed a payment half in cash and half in long term notes, and HHM was interested only in a sale for cash (R. 270).

An established manufacturing company, which had expressed interest in buying HHM, similarly was informed that HHM would not consider any offer not involving a cash payment of approximately $3,000,000 (*ibid.*). Another potential purchaser, sponsored by an officer of the Bank of New York, was advised by Mosman in May 1959 that HHM was "not for sale" (R. 286, 271, 274–281, 284–288).

THE DISTRICT COURT'S DECISION ON THE MOTION

Ruling from the bench, the district court granted Diebold's motion. It stated (R. 589):

> The motion for summary judgment will be allowed within the principles enunciated by the International Shoe case * * * and, of course, you understand from that this case turns strictly on the principle there that this was a failing company, and we do not go into the merits of the competitive feature.

The court adopted the Findings of Fact and Conclusions of Law proposed by Diebold (R. 590). With respect to HHM's financial status, the court accepted the data concerning HHM's financial condition which Diebold had submitted in its supporting papers, and on the basis of these data concluded that "At the time of its acquisition by Diebold on September 11, 1959, and for at least 9 months prior thereto, HHM was hopelessly insolvent and faced with imminent receivership." (Fdg. 28, R. 569.) The court further found (Fdg. 31, R. 569–570): "By reason of its precarious financial condition, HHM could not long have survived as an independent competitor in its line of business and could not have achieved a sale to anyone else. But for the sale to Diebold, HHM would have been forced to liquidate its business in insolvency proceedings, with resultant heavy losses to employees, creditors, and stockholders." The findings make no reference to the information and data submitted by the government and summarized above.

With respect to the three other prospective purchasers, characterized in the findings as "promoters", the court found that none had made a "firm" offer; that "Diebold made the only firm, bona fide offer to pay $3,000,000 cash and to assume all liabilities" (Fdg. 26, R. 569; Concl. of Law 4, R. 570); and that "Diebold was the only bona fide prospective purchaser for HHM's business. Aside from Diebold, no one else ever made an actual offer for HHM's business or property" (Fdg. 30, R. 569).

In *International Shoe Company* v. *Federal Trade Commission*, 280 U.S. 291, 302–303, this Court held, as one of two grounds for setting aside a Commission order under Section 7 of the Clayton Act, that where a corporation was "in failing circumstances,"

> with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated * * * the purchase of its capital stock by a competitor (there being no other prospective purchaser), not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudicial to the public and does not substantially lessen competition or restrain commerce within the intent of the Clayton Act. * * *

This doctrine has become known as the "failing company" exception to Section 7. Its rationale is as follows: Section 7 prohibits only those acquisitions, the effect of which "may be substantially to lessen competition, or to tend to create a monopoly." Where a company is in such severe financial straits that, if it attempted to continue as an independent enterprise, it would soon go out of business, it is no longer a significant competitive factor in the market. The elimination by merger, rather than through the

inevitable process of business failure, of a company that has ceased to be of any competitive significance cannot be said substantially to lessen competition.[12]

The mere statement of the doctrine and its rationale, however, emphasizes "the narrow scope of the exception" (Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics,* 74 Harv. L. Rev. 226, 342; see, also, Note, 68 Yale L.J. 1627, 1664–1665). For, in terms of the acquired company's financial situation, an acquisition may be said to pose no threat of substantial injury to competition only if it is clear that, standing alone, the acquired firm would not be able to survive as an independent enterprise. A mere reversal of a company's previously favorable growth trend, or its temporary financial difficulties, or even actual operating losses over a relatively short period, are not enough to establish a "failing company" defense. A company in such circumstances may nevertheless still be an important competitive factor; and its elimination through merger may therefore substantially lessen completion or tend toward a monopoly, in violation of Section 7.

---

[12] In *International Shoe* the charge in the complaint that the acquisition "tended to create a monopoly" had "not been pressed and may be put aside" (280 U.S. at 294). Consequently the "failing company" doctrine was enunciated solely with respect to lessening competition and restraining trade (see *id.* at 303). Where, as in the instant case, there are only a small number of companies in the relevant market, the acquisition of one by another may well "tend to create a monopoly", in violation of Section 7, even if it be assumed that the alternative to acquisition would be the elimination of the "failing company" from the market.

The legislative history of the 1950 amendment to Section 7 of the Clayton Act, 64 Stat. 1125, shows that Congress intended the "failing company" defense to be available under the amended Act. H. Rep. No. 1191, 81st Cong., 1st Sess., p. 6; S. Rep. No. 1775, 81st Cong., 2d Sess., p. 7; 96 Cong. Rec. 16601–16602, 16606. That history also indicates, however, that Congress was aware that the defense was available only if the acquired firm was truly "failing." For both the House and the Senate committee reports discussed the issue in terms of whether the proposed amendment would preclude the sale of a company which is in a "failing or bankrupt condition" (H. Rep. No. 1191 and S. Rep. No. 1775, *supra*), and both quoted the langauge from *International Shoe* set forth at page 21, *supra*, to show that the defense would be available in such circumstances. Similarly, the lower federal courts and the Federal Trade Commission have frequently recognized that an acquired firm cannot qualify as a "failing company" unless it clearly appears that the company could not continue as an independent enterprise.[13]

---

[13] See *Erie Sand & Gravel Co.* v. *Federal Trade Commission*, 291 F. 2d 279, 280–281 (C.A. 3); *Crown Zellerbach Corp.* v. *Federal Trade Commission*, 296 F. 2d 800, 831–832 (C.A. 9); *United States* v. *Maryland and Virginia Milk Producers Ass'n*, 167 F. Supp. 799, 808 (D.D.C.); *In re Pressed Steel Car Co., of New Jersey*, 16 F. Supp. 329, 338–339 (W.D. Penna.); *Pillsbury Mills, Inc.*, CCH Trade Reg. Rep. (1960-1961 FTC Cas.) Par. 29,277 at pp. 37,628–37,630) (pending on petition to review, C.A. 5); *Farm Journal, Inc.*, 53 F.T.C. 26, 47–48; cf. *Beegle* v. *Thomson*, 138 F. 2d 875, 881 (C.A. 7).

The basic error of the district court in the present case was its failure to recognize the narrow scope of the exception. The uncontroverted evidence shows that, in the years preceding the merger, HHM had substantially increased its sales and earnings, had considerably improved its financial position, and was, according to the customary indicia of business health, in a sound condition. It would create a serious loophole in Section 7 to treat such a firm as "failing." The result would be to sanction the acquisition of companies which would otherwise be able to continue as independent competitive firms, and without any examination of the effect of the acquisition upon actual competition in the market.

Admittedly, HHM did have financial problems in the summer of 1959. Those problems, however, plainly did not make it a company "with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure" (*International Shoe, supra*). In these circumstances, the district court's conclusory findings that, at the time of the acquisition, HHM "was hopelessly insolvent and faced with imminent receivership" (Fdg. 28, R. 569), and "[b]y reason of its precarious financial condition, HHM could not long have survived as an independent competitor in its line of business" (Fdg. 31, R. 569–570), are clearly erroneous and should be rejected.

The undisputed evidence in this case shows that HHM was not a "failing company" under that doctrine as enunciated in *International Shoe*. The dis-

trict court thus plainly erred in granting Diebold's motion for summary judgment based on that defense. But even if the material submitted by the government in opposition to the motion did not compel rejection of the "failing company" defense, at the least it raised questions of fact which could be resolved only after a trial, and thus precluded granting summary judgment against the government.

ARGUMENT

I

THE UNDISPUTED FACTS SHOW THAT THE ACQUISITION DOES NOT COME WITHIN THE "FAILING COMPANY" DOCTRINE OF THE *INTERNATIONAL SHOE* CASE

In *International Shoe* this Court held (280 U.S. at 302) that an acquisition did not substantially lessen competition where:

(a) The acquired corporation's resources were "so depleted and the prospect of rehabilitation so remote" that it faced "the grave probability of business failure";

(b) there was no other prospective purchaser;

(c) the officials of the acquired company fully canvassed the alternatives to sale and "after much consideration felt compelled to choose the [sale] alternative"; and

(d) the purchaser's purpose was not to lessen competition.

In the present case, the undisputed facts show that none of the first three criteria is satisfied. The district court made no express finding with respect to

the fourth criterion and, on the basis of this record, none could have been made without a trial (see Point II, *infra*, pp. 42–44).

A. ***HHM Was Not in a Failing or Bankrupt Condition at the Time of the Acquisition.***

1. In *International Shoe*, this Court, on the basis of its analysis of the acquired company's financial history as disclosed in the comprehensive hearing record made before the Federal Trade Commission, found that its situation was such "as to necessitate liquidation or sale" (280 U.S. at 294); and that it was "a corporation in failing circumstances, the recovery of which to a normal condition was, to say the least, in gravest doubt" (*id.* at 301) and "a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure" (*id.* at 302).

In reaching this conclusion in the *International Shoe* case, the Court relied upon the following facts (*id.* at 299–300): The acquired firm lost more than $6 million in the year prior to the acquisition; within the year it had exhausted a surplus of $4 million and piled up a deficit of close to $4½ million; it owed $15 million to banks and $2 million on current account; new orders were not coming in and it was producing at only 15 percent to 18 percent of capacity; it had excessive commitments for raw materials, large inventories of finished shoes on hand, and inadequate funds to pay its debts as they became due; it had passed dividends on two classes of stock and was about to do so on the third; its annual financial statement, due to

be filed under Massachusetts law, would disclose that it was insolvent.

In contrast, the undisputed facts of the present case show no such picture of imminent financial disaster. Rather, they reflect an economically healthy company whose financial condition had steadily improved for many years prior to the acquisition. Instead of a $6 million loss in the year preceding the sale, HHM in fiscal 1959 had a net profit of $187,602.73 after taxes, a figure higher than in either of the two previous years (R. 334, Table 1). Instead of exhausting a surplus of $4 million and compiling a $4.5 million deficit in the year preceding the sale, HHM in fiscal 1959 for the first time had a tangible net worth in excess (by almost $400,000) of its total liabilities (R. 243). Instead of owing $15 million to banks and $2 million on current accounts, HHM in fiscal 1959 had reduced its liability on notes and loans payable from slightly more than $700,000 to slightly less than $300,000, and had no long-term debt (R. 331, par. A6). While the dollar value of HHM's sales in 1958, which was a recession year, had fallen slightly (six percent) from the 1957 peak (and inventories had increased by a similar percentage), the company (unlike the acquired company in *International Shoe*) paid its regular two dollar dividend, and had the highest retained earnings for the preceding five-year period, $2,247,986 (R. 331).

Indeed, the company had a history of almost uninterrupted growth. Its net sales rose from slightly more than $1 million in 1944 to more than $5 million

in 1949 and to $10.7 million in 1957 (R. 337). Although sales declined by about $300,000 or three percent, in each of the two succeeding years, net sales in 1959, the year of the acquisition, still exceeded $10 million (*ibid.*). The company's working capital was a minus figure in 1944, but in 1949 it was more than $200,000 and in 1959 more than $1,300,000, a six-fold increase in 10 years and the highest in its history (R. 340). In each of the five years between fiscal 1954 and fiscal 1959 the company made money and paid dividends, and also increased its retained earnings account from $1¼ million to $2¼ million. Payment of noncurrent bank loans as well as of the mortgage on its land, building and equipment had been completed within the three years preceding the sale (R. 331, par. A6).

2. Without disputing the foregoing data, Diebold argues (Motion to Affirm, p. 19) that the district court correctly treated such facts as "irrelevant and noncontrolling". The relevant and central consideration, Diebold urges, was "HHM's current position during the summer of 1959" (*ibid.*). During this period, it argues, following "a long period of expansion" allegedly supported by "inadequate working capital," there was a "cutback in sales" and a "sudden, sharp increase of inventories" (*ibid.*), and HHM's cash assets were not sufficient to pay its bills as they became due (*id.*, pp. 18–21).

This picture of HHM as an expanding, but marginal, enterprise caught in a sudden reversal of its fortunes from which it was unable to extricate itself, is,

as we have shown, contradicted by the record. The "cutback in sales" takes as its starting point HHM's sales in its peak year 1957 and then stresses the total decrease in two years of six percent. Such a relatively small decrease did not indicate imminent economic disaster; the lower sales figures for 1959 still gave HHM its third best year in its history (R. 337). Furthermore, HHM's return on net sales increased from 4.14 percent in 1958 to 4.73 percent in 1959, while that of its competitors declined: Diebold's decreasing from 11.48 percent to 10.81 percent and Mosler's dropping from 9 percent to 2.07 percent (Neisser Affidavit, Appendix Table 1).

The sudden "sharp increase of inventories" cited by Diebold apparently refers to figures purporting to show that inventories decreased from $1,833,652 in 1957 to $1,644,598 in 1958 and then increased to $1,906,342 in 1959 (R. 239).[14] This increase in inventories roughly paralleled the decrease in sales; it too gave no indication that the company was heading for insolvency. Diebold ignores the fact that the more than $1,300,000 of working capital available to HHM in fiscal 1959 was the highest in its history; that HHM's working capital ratio of 1.68 compared favorably to the highest ratio it ever achieved, 1.70 in 1951 and 1952 (R. 340); and that in 1959 HHM was able to obtain twice as many sales per dollar of available

[14] The government's figures introduced in opposition to the motion for summary judgment showed that inventories rose from $1,496,688 in 1958 to $1,600,152 in 1959, an increase of only $103,464 during the year (R. 335).

working capital as either Mosler or Diebold (Neisser Affidavit, p. 11, par. 20) and to show a profit of $36 for every hundred dollars of working capital while Diebold returned $41 and Mosler only $6 (*id.*, Appendix: Table 7).

We do not suggest that HHM in 1959 was without financial problems; in that period, as throughout its recent history, it was apparently operating on thin cash margins. But to ignore HHM's long-term development, exaggerate its short-term problems, and then characterize it as "hopelessly insolvent and faced with imminent receivership" (R. 569), is pure hyperbole. The record shows that the real reason why HHM was sold to Diebold was because HHM's president and largest stockholder wished for personal reasons to liquidate his investment and to secure the highest possible cash return therefor (R. 6, par. 3; R. 26, par. 3), and not because of the company's alleged financial problems.

A similar failing company claim, based on the acquired firm's temporary financial difficulties, was recently rejected in *Crown Zellerbach Corp.* v. *Federal Trade Commission,* 296 F. 2d 800, 831–832 (C.A. 9). In that case it was alleged that the acquired company's "management had been poor and inadequate; that it had obsolete equipment which it could not replace; and that its prospects for survival seemed dim" (296 F. 2d at 831). The evidence showed that the company had overextended itself in a modernization program and was having difficulties in financing this program; during this period of uncertainty the company's pres-

ident had died unexpectedly (*ibid.*). The record also showed, however, that the company had increased its sales and its earnings over the 10-year period prior to the acquisition and had regularly paid dividends (*id.* at 832). The court of appeals held that the "circumstances would permit a finding that the directors wanted to quit; but the record does not compel a finding that St. Helens was in a failing or near bankrupt condition. Quite the contrary." *Id.* at 831; see also *Pillsbury Mills, Inc.*, CCH Trade Reg. Rep. (1960–1961 FTC Cas.), Par 29.277 at pp. 37,628–37,630 (pending on petition to review, C.A. 5).

B. *Diebold Was Not the Only Available Purchaser of HHM; At Least Three Other Prospective Purchasers Were Interested.*

1. In *International Shoe,* the Court stressed that International was "the only available purchaser" (p. 301) and "there [was] no other prospective purchaser" (P. 302). The significance of this factor is that the willingness of other persons to invest in and operate the business strongly "suggests that the hopelessness of its position may be open to question and that new capital and new methods may be applied to improve the situation" (Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics,* 74 Harv. L. Rev. 226, 345). Moreover, the existence of other prospective purchasers may not only show that the company is not "failing," but may require the rejection of the defense without regard to the firm's financial position. For if such other purchasers are not existing competitors of the acquired company (as

in the present case, see *infra*), their acquisition and operation of the firm would permit it to continue as a competitive factor in the market. Where such a sale is possible, the acquisition of the company by a competitor, even at a higher price, may violate Section 7 because of its anticompetitive effect. See Bok, *supra*, pp. 346–347; Note, 68 Yale L. J. 1627, 1666–1668.

2. In the present case, the district court found (Fdg. 30, R. 569) that "Diebold was the only bona fide prospective purchaser for HHM's business. Aside from Diebold, no one else ever made an actual offer for HHM's business or property." This finding is contradicted by the unchallenged evidence in the record; it is clearly erroneous.

The district court itself found (Fdg. 26, R. 569) that "[w]hen a rumor spread around during the latter part of 1958 and the first half of 1959 that the stock or assets of HHM might possibly be for sale, three different promotors solicited the HHM ownership-management to consider tentative schemes for acquiring, merging, or exchanging the stock or assets of HHM." The record shows that these three "promotors" were all apparently seriously interested in acquiring HHM, and that at least one of them expended considerable time and money in looking into the possibility.

James Boyce was the president of a heavy construction machinery company and had other business interests, but none connected with the bank vault equipment field. Boyce stated that his company "was

definitely interested in acquiring [HHM] and had devoted considerable time and money towards this end" (R. 345–346); that "negotiations had progressed to the point where I went to Hamilton, Ohio, to meet with Mr. Mosman and looked over his facilities" (R. 345); and that these negotiations had continued until he learned of the sale to Diebold (*ibid.*). A lengthy memorandum (R. 347–355), prepared for Boyce, showed (a) that the matters of price, methods of financing and management had been analyzed, (b) that tables showing various HHM income and balance sheet items projected over a ten-year period had been under study, (c) and that Hayden-Stone & Co. (a large investment banking firm) had been named to form a purchasing group.

Mosman, the president of HHM, admitted in answer to interrogatories that in 1959 Boyce had made "[a]n oral offer * * * to acquire all the assets, except land, buildings and life insurance, for $3,000,000" (R. 270). HHM did not accept the offer because it "was interested only in a sale for cash * * *" (*ibid.*).

The Bank of New York, inquiring in the spring and summer of 1959 on behalf of a director of the American Chain & Cable Company, was told that HHM "is not for sale" (R. 286, 270–271, 274–281, 284–288). Officials of another company met and corresponded with Mosman regarding the purchase of HHM (R. 272–274, 357). Mosman told them that he would not sell for less than $3,000,000 "in cash" (R. 270).

3. The district court found (Fdg. 26, R. 569) that "[n]one of these overtures ever approached the

concreteness of a firm offer or a firm price and no financial data or operating figures were supplied by HHM. Diebold made the only firm, bona fide offer to pay $3,000,000 cash and to assume all liabilities." But in view of the uncontradicted facts set forth above, this finding (to the extent that it is accurate) is irrelevant to the issue whether the failing company defense is available.

Acquisitions of major industrial concerns necessarily involve exploratory discussions and investigations, and a prospective purchaser is no less "available" or "bona fide" because he has not yet reached the point of making a firm offer. Indeed, in view of the fact that "no financial data or operating figures were supplied [to the three other prospective purchasers] by HHM," it is hardly surprising that no other firm offers were made. The finding that "Diebold made the only firm, bona fide offer to pay $3,000,000 cash and to assume all liabilities" merely indicates that Diebold was the only purchaser who was willing to meet the precise terms on which the sale was finally made. It does not indicate that other prospective purchasers were not interested. See *Erie Sand & Gravel Co.* v. *Federal Trade Commission,* 291 F. 2d 279, 280 (C.A. 3), where the court pointed out that "although Erie was high bidder with an offer of about one million dollars, there were several other substantial offers of $800,000 or more for the going concern. Thus, had Erie not bid, the prospect was not the elimination of a competing enterprise but merely its continuation under some new proprietorship."

C. *HHM Would Not Have Been Required to Liquidate its Business in Insolvency Proceedings if it Had Not Been Sold to Diebold.*

1. In *International Shoe* this Court stressed that the officers of the acquired company "after long and careful consideration of the situation, concluded that the company was faced with financial ruin, and that the only alternatives presented were liquidation through a receiver or an outright sale" (280 U.S. at 299); that, before deciding to sell, the officers, stockholders and creditors had given "much consideration" to other alternatives, such as obtaining additional bank loans, reorganizing through a receivership, or going into bankruptcy (*id.*, at 301–302); and that the sale of its capital stock was made "in order to avoid what its officers fairly concluded was a more disastrous fate" (*id.* at 301). The significance of such thorough investigation and consideration by the officials of the acquired company is that it serves to demonstrate that sale is, in fact, the only real alternative to letting the company go out of business.

2. In the present case, however, there is no evidence in the record that the HHM management selected sale of the business as an alternative to the "more disastrous fate" of "financial ruin" or "liquidation through a receiver."

The district court found (Fdg. 31, R. 569–570) that "[b]ut for the sale to Diebold, HHM would have been forced to liquidate its business in insolvency proceedings." To the extent that this finding merely reflects the court's view that HHM was facing imminent financial collapse at the time of the acquisition,

we have already shown that it is clearly in error. To the extent that it states that there was no alternative other than sale available to HHM, it has no support in the record.

The only evidence in the record touching on the need for liquidation is the statement of Mosman, HHM's president, that, as the result of an unfavorable wage contract entered into with the union in the spring of 1959, "I gave serious consideration to recommending to the Board of Directors that the company be liquidated" (R. 267). This falls far short of the kind of intensive consideration by the company's officials that led to the determination by the acquired company in *International Shoe* to liquidate by sale. In that case the former vice-president of the acquired company testified that the company's executives discussed its financial "conditions" "[a]lmost daily" in 1921 and that it was their "feeling" at that time that the company "was rapidly going on the rocks" (Record on appeal, No. 42, O.T., 1929, p. 292). He further stated (*id.*, p. 294) that, "[f]aced with this situation * * * the executives * * * considered all possible alternatives for saving the company from receivership and liquidation; a study was made as to the possible alternatives; only one alternative seemed to offer any hope of success. * * * That was to negotiate a sale of the company to the International Shoe Company, who seemed to be the only possible customer in the United States at that time * * * who would be in a position to even consider such a transaction. * * * We made a fairly

careful study and careful inquiries before reaching that result."

If HHM really was in a precarious financial condition in 1959, facing imminent insolvency and liquidation, its management would undoubtedly have made similar careful studies as to possible solutions. There is nothing in the record that shows any such inquiries. On the contrary, Mosman's attitude toward the other prospective purchasers was, at best, unenthusiastic; his position was that he would not sell unless he received $3,000,000 in cash. The explanation for his attitude is not difficult to discover. The evidence in the record dealing with his motive for selling—sparse though it is—shows no indication that he believed a sale was the only alternative to insolvency. On the contrary, the record shows that Mosman wished to liquidate his investment in HHM primarily for tax purposes and also because of his concern that, if he became ill or incapacitated, there was no top management available to carry on the business successfully (R. 6, par. 3, R. 26, par. 3). Although Mosman was the person most familiar with HHM's financial condition, he never stated, suggested, or indicated any belief that the company was facing imminent financial collapse. Moreover, Diebold itself did not raise the failing company defense until many months after the government's complaint had been filed (see *supra,* pp. 4–5).

* * * * *

In sum, the failing company defense is applicable only where the record clearly shows that the basic economic condition of the acquired business, includ-

ing its history of, and prospects for, growth and development, indicate that collapse is imminent. The record in this case plainly does not establish such likelihood of collapse. At most, it shows that, despite HHM's impressive record of growth, development and basic financial soundness, the company had some short-term financial problems in 1959. That is surely not enough to establish that the company was "failing" within the *International Shoe* doctrine.

II. THE FINDINGS UPON WHICH THE DISTRICT COURT UPHELD THE FAILING COMPANY DEFENSE REST UPON MATERIAL FACTS AND INFERENCES WHICH ARE THE SUBJECT OF DISPUTE; SUMMARY JUDGMENT WAS THEREFORE IMPROPER

This Court in *Poller* v. *Columbia Broadcasting System, Inc.*, No. 45, this Term, decided February 19, 1962 (slip op., p. 3), recently reemphasized that Rule 56(c) of the Federal Rules of Civil Procedure [15]

> authorizes summary judgment "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, * * * [and where] no genuine issue remains for trial * * * [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues

[15] Rule 56(c) authorizes the entry of summary judgment if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * *

to try." *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944).

In Point I, *supra*, we have argued that, on the basis of the uncontroverted facts in the record, the district court should have rejected the "failing company" defense. But even if we are wrong in that argument, those facts at least raised a number of factual issues that precluded the grant of summary judgment in favor of Diebold. On this record, there were genuine issues with respect to the following material facts relating to the failing company defense: (1) whether HHM faced imminent financial collapse; (2) whether there were other bona fide prospective purchasers; (3) whether a sale to Diebold was the only feasible course open to HHM to avoid termination of its business and the dispersal of its assets; and (4) whether Diebold had an anticompetitive purpose in acquiring HHM.

1. As we have proved, the undisputed facts did *not* show that HHM faced imminent financial collapse. The data submitted by the government established that the company had a long record of good earnings and dividends, that it was free of long-term debt and had substantially improved its financial position, and that at the time of its acquisition it was operating successfully (*supra*, pp. 8–16). These data demonstrated that the issue whether HHM faced imminent financial collapse was, at the least, not free from doubt. In addition, there were the opinions of a government economist and accountant that before the acquisition HHM was in a sound financial condition

and was neither in a failing condition nor heading in that direction (R. 333, 600).

Furthermore, the court's conclusory finding of imminent financial collapse was based on subsidiary findings, many of which were themselves contested or based on inferences drawn in favor of Diebold, contrary to the settled rule that on a motion for summary judgment the court looks "at the record * * * in the light most favorable to * * * the party *opposing* the motion * * *." *Poller* v. *Columbia Broadcasting System, Inc., supra,* at p. 9 (emphasis added). For example, the court found that "in fiscal 1959 * * * inventories built up in the amount of $262,000" (Fdg. 8, R. 563), whereas the government's data, which were based on the company's certified annual financial statement, showed the increase in inventory to be only $103,463.88 (R. 335). The court found (Fdg. 4, R. 562) that HHM made "frequent" use of bank loans to finance the company's annual sales volume. The record does not show that such loans were "frequent". This is an inference drawn by the court in favor of Diebold, apparently on the basis of a generalized statement that bank loans had been made for such purpose (R. 266). The court found (Fdg. 5, R. 562–563) that "[i]n an effort to improve its net working capital position, HHM consistently retained * * * the proceeds from the periodic liquidation of its readily disposable divisions and subsidiary companies." Again, this is an inference drawn in favor of Diebold. For the only record support for this finding is a statement by Mosman, the president of HHM, that "[i]n an

effort to concentrate its business activities in Hamilton [the location of it principal plant] * * *" (R. 266), the company sold various assets and retained the proceeds in the business. An effort to concentrate business activities at the main plant is not the same thing as an effort to improve net working capital position.

The court also made various findings that HHM's cash position was critical, that it was short of working capital, and that it was overdrawn on its bank accounts (Fdgs. 3–6, 9–13, R. 562–565). These issues were in dispute, however, for it was the opinion of the government's expert that HHM's cash position was not critical and that a company such as HHM, whose principal customers are the federal government and substantial banking institutions, has less need to keep its assets in the form of cash than a company with many small customers (*supra*, p. 13). The record also showed that HHM always had sufficient funds in its accounts to cover all checks presented for payment (*supra*, pp. 13–14). Furthermore, by entering summary judgment, the court foreclosed the government from showing that to a large extent any deterioration in HHM's cash position occurred after HHM and Diebold had orally agreed in May 1959 on the basic terms of the agreement (*supra*, pp. 14, n. 9, 16, 18), which required Diebold to pay all of HHM's liabilities unpaid at the date of closing (R. 382);[18] and that any subse-

[18] With exceptions, such as tax deficiencies for prior years, not here relevant.

quent weakening in HHM's cash position was not the result of any inherent weakness in the company's operations or financial condition.

2. We have discussed in Point I, *supra*, pp. 31–37, the evidence showing that Diebold was not the only prospective purchaser of HHM, and that sale to Diebold was not the only feasible alternative to financial ruin. In any event, this evidence raised sufficient factual questions on those issues to preclude the district court from granting summary judgment in favor of Diebold.

3. The district court made no explicit finding as to Diebold's purpose in acquiring HHM. It did find, however, that "Diebold was in need of additional plant space" (Fdgs. 27, 29, R. 569), thus suggesting that this, rather than the elimination of a competitor, was the purpose of the purchase (cf. *International Shoe*, *supra*, 280 U.S. at 302).

There was evidence in the record, however, which was sufficient to raise a question whether Diebold's purpose was to lessen competition. Diebold paid $3,000,000 in cash and agreed to assume liabilities of about $1,800,000 for the assets of a company whose total net worth was approximately $2,300,000 (R. 334, Table 4; R. 243). This disparity between the net worth of HHM and the price Diebold paid at least suggested that the elimination of a competitor may have been Diebold's purpose in buying HHM.

The government also filed the affidavit of a small businessman who reconditioned and sold used bank vault doors and safes (R. 395–402). He stated that

after Diebold in 1958 had acquired a bank vault equipment manufacturer which had been one of his principal customers for rebuilt doors since 1955, he turned to the manufacture of safe deposit boxes (R. 396). An executive of Diebold then came to his office and "offered to throw some Diebold installation and service work my way if I would agree to stop production of safe deposit boxes" (R. 397).

Additional facts, which raised a question as to Diebold's purpose, were the following: Diebold agreed to employ Mosman, the president of HHM, for nine years at a generous salary (R. 96, 391–395), and also agreed to pay Mosman's expenses and dues during this period at various "clubs" (R. 394). Before Diebold committed itself to the purchase, it had learned that there was at least one significant inaccuracy in the April 30, 1959, balance sheet upon which the parties relied in connection with the sale (R. 222a); it nevertheless went ahead with the transaction. Furthermore, despite this disclosure, Diebold agreed, with certain exceptions (R. 382; R. 10, Par. 19), to pay (a) HHM's obligations reflected on this April 30, 1959, balance sheet which were unpaid at the date of closing, *and* (b) those incurred after April 30, 1959, and unpaid at the date of closing (R. 382). In addition, since acquiring HHM, Diebold has closed down HHM's sales offices (R. 183–185, 192–199) and has continued in its employ only 370 of the 664 HHM employees (R. 568–569, Fdg. 25).

Looking at this record in the light "most favorable to [the government], the party opposing the motion"

(*Poller, supra*), it is clear that no summary determination of whether Diebold had an anticompetitive purpose could be made.

* * * * *

In sum, as to none of the foregoing integral elements of the "failing company" defense could it be said "there [was] conclusive evidence supporting [Diebold's] theory." *Poller, supra,* at p. 9. The district court, therefore, improperly granted the motion for summary judgment. Even if the record did not require rejection of the failing company defense, it plainly precluded its summary acceptance without a trial.

CONCLUSION

For the foregoing reasons, the order of the district court granting the motion for summary judgment should be reversed and the case should be remanded to the district court with instructions to proceed to trial.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
LEE LOEVINGER,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
Assistant to the Solicitor General.
RICHARD A. SOLOMON,
IRWIN A. SEIBEL,
JOHN M. TOOHEY, JR.,
Attorneys.

MARCH 1962.

U.S. GOVERNMENT PRINTING OFFICE: 1962